

NO. PD-0503-17

**IN THE COURT OF CRIMINAL APPEALS
FOR THE
STATE OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
8/28/2017
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**GEORGE DELACRUZ,
APPELLANT**

V.

**STATE OF TEXAS,
APPELLEE**

**PETITIONER'S BRIEF ON PETITION FOR DISCRETIONARY
REVIEW OF THE DECISION IN THE THIRD COURT OF
APPEALS**

CAUSE NO. 03-15-00302-CR

ORAL ARGUMENT REQUESTED

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PARTIES TO TRIAL COURT'S FINAL JUDGMENT

In accordance with Tex.R.App.Proc. 38.1(a), Appellant certifies that the following is a complete list of the parties and their counsel:

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TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW George Delacruz, Petitioner in this cause, by and through his attorney and files this his brief on petition for discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner has raised important questions of first impression in this Court and believes that oral argument would help clarify the issues presented in his petition for discretionary review. Therefore he respectfully requests oral argument.

STATEMENT OF THE NATURE OF THE CASE

Petitioner was indicted in this cause on September 13, 2013 for two counts of murder. (C.R. 7-8) On April 22, 2015, after hearing the evidence and argument of both the State and the defense, the jury found Petitioner guilty of the offense of murder. (R.R. VIII, pp. 79-80; C.R. 139-145) On April 23, 2015, after hearing the evidence and argument from counsel, the jury assessed Petitioner's punishment at life imprisonment. Petitioner was sentenced that day. (R.R. IX, pp. 41-43; C.R. 146-151, 162-163)

Petitioner filed a motion for new trial on April 28, 2015. (C.R. 169-

170) Notice of appeal was filed on April 28, 2015. (C.R. 171) The trial court's certification of defendant's right to appeal was filed on April 23, 2015. (C.R. 153)

STATEMENT OF THE PROCEDURAL HISTORY

On April 21, 2017, the Third Court of Appeals handed down an opinion in this case. Delacruz v. State, 2017 Tex.App.LEXIS 3563, NO. 03-15-00302-CR (Tex.App.-Austin, 2015, delivered April 21, 2017). No motion for rehearing was filed. A petition for discretionary review was filed and review was granted.

STATEMENT OF THE GROUNDS FOR REVIEW

GROUND FOR REVIEW NUMBER ONE

IN A MURDER CASE, WHERE THERE IS NO BODY, NO DIRECT EVIDENCE OF A DEATH AND NO DIRECT EVIDENCE TO SHOW THAT PETITIONER ACTED EITHER INTENTIONALLY OR KNOWINGLY IN CAUSING THE ALLEGED VICTIM'S DEATH OR ACTED WITH INTENT TO CAUSE SERIOUS BODILY INJURY AND COMMITTED AN ACT CLEARLY DANGEROUS TO HUMAN LIFE THAT CAUSED THE ALLEGED VICTIM'S DEATH, MUST THE STATE PROVE A "FATAL ACT OF VIOLENCE" IN ORDER TO CONVICT A PERSON OF MURDER?

GROUND FOR REVIEW NUMBER TWO

THE COURT OF APPEALS ERRED IN FINDING THE EVIDENCE SUFFICIENT TO SUPPORT PETITIONER'S CONVICTION FOR MURDER WHEN THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE ALLEGED VICTIM WAS DECEASED AND THAT HER DEATH WAS CAUSED BY A CRIMINAL ACT OF PETITIONER.

GROUND FOR REVIEW NUMBER THREE

DID THE COURT OF APPEALS ERR IN FINDING THE EVIDENCE SUFFICIENT TO SUPPORT PETITIONER'S CONVICTION?

GROUND FOR REVIEW NUMBER FOUR

THE COURT OF APPEALS RENDITION OF CRUCIAL EVIDENCE IN ITS OPINION WAS ERRONEOUS AND THE COURT OF APPEALS RELIED ON THIS ERRONEOUS RENDITION OF THE EVIDENCE IN FINDING THE EVIDENCE SUFFICIENT TO SUPPORT PETITIONER'S CONVICTION.

STATEMENT OF FACTS

The indictment in this case contained two counts and alleged that Petitioner committed the offense of murder. Count I of the indictment specifically alleged that Petitioner:

“on or about the 26th day of March, 2010, . . . in the County of Travis, and State of Texas, did then and there intentionally or knowingly cause the death of an individual, to wit, Julie Ann Gonzalez, by a manner and means unknown to the Grand Jury,” (C.R. 7)

Count II of the indictment specifically alleged that Petitioner:

“on or about the 26th day of March, 2010, . . . in the County of Travis, and State of Texas, did then and there with intent to cause serious bodily injury to an individual, to wit: Julie Ann Gonzalez, commit an act clearly dangerous to human life that caused the death of the said Julie Ann Gonzalez by a manner and means unknown to the Grand Jury,” (C.R. 7-8)

Texas Penal Code, Sec. 19.02(b).

The evidence showed that Julie Ann Gonzalez disappeared on March 26, 2010 and at the time of trial in April of 2015, had not been seen or heard from since then. During the trial, all of the investigators in the case acknowledged that they did not know if Ms. Gonzalez was alive or dead.

The Events Surrounding Gonzalez’s Disappearance

The State’s first witness, thirty-four year old Aaron Breaux, testified that he first met Ms. Gonzalez in 2006 or 2007 when he worked at her grandparents’ store near Dripping Springs. Ms. Gonzalez was a teenager at

the time. The pair began secretly dating and when Gonzalez's family found out, Breaux was fired and the couple broke up. Breaux did not see Gonzalez again until October of 2009 when he ran into her at an HEB store in Austin. Gonzalez told Breaux that she and Petitioner had begun dating in high school, got married and had a child, L____ D____, together. When Breaux reconnected with Gonzalez, she and Petitioner were having trouble and they separated in November of 2009. After Gonzalez separated from Petitioner, Breaux and Gonzalez began dating with Gonzalez and L____ D____ occasionally spending the night with Breaux. (R.R. II, pp. 233-244) Breaux testified that Gonzalez filed for a divorce but Petitioner would not agree to sign the paperwork. (R.R. II, p. 250) Breaux testified that when Gonzalez went missing, his relationship with Gonzalez was going great. They were planning for the future, looking for an apartment so they could move in together and talking about getting married and having children together. Breaux also testified that Gonzalez never talked about meeting someone new or moving to Colorado. (R.R. II, pp. 252-253) Breaux told the jury that Gonzalez worked as a pharmacy tech at a Walgreens and that she loved her job. (R.R. II, pp. 253-254) He also told the jury that L____ D____, her child, was the most important thing in her life. (R.R. II, p. 254) The week before Gonzalez disappeared, L____ D____ was staying with

Petitioner. Breaux testified that originally Gonzalez was supposed to pick L_____ D_____ up on Thursday but Petitioner asked if he could keep L_____ D_____ until Friday morning. The pair agreed that Gonzalez would pick L_____ D_____ up on Friday morning. Gonzalez spent the night at Breaux's apartment. Breaux testified that he left his apartment at approximately 6 a.m. on Friday morning to go to work. Gonzalez was still in bed. Breaux testified that he texted Gonzalez at 9 a.m. but got no response. Throughout the morning he called Gonzalez and texted her but never got a reply. At around 2:00 in the afternoon, he received a text from Gonzalez that said "I can't do this anymore." Breaux told the jury that it sounded like Gonzalez was breaking up with him. He continued to text her and call her and got no response. Finally, in one text, he wrote, "If this is you, tell me what my middle name is." She replied that she did not feel like playing games. Breaux testified that when he tried to call Gonzalez after he got off work, her phone was turned off. He received one more text from Gonzalez on Saturday morning and then he never heard from her again. (R.R. II, 254-263) Breaux testified that when he returned home from work on Friday afternoon, Gonzalez's belongings were still at his house and she had left a love letter, State's Exhibit 4, on his bed. (R.R. II, pp. 263-269)

Breaux's roommate Joshua Dear, testified that he woke up that Friday

morning, March 26, 2010, around 8:30 and heard Gonzalez moving around in the apartment. Gonzalez was gone by the time Dear got up around 9:00 a.m. (R.R. II, pp. 279-285)

The evidence showed that Petitioner, who was twenty-two years old at the time of Gonzalez's disappearance, lived with his mother and sisters in his childhood home on Garden Oaks Drive in South Austin. (R.R. III, p. 119, 121-123) The Corpus family lived next door to Petitioner's home. Jesse Corpus, Jr. testified that he had known Petitioner all of his life. Jesse Jr. testified that he was at home on the morning that Gonzalez disappeared. He was in his room, trying to go to sleep, when he heard a car drive up and park between his house and Petitioner's house. Jesse, Jr. testified that he saw a man get out of the car and walk towards Petitioner's house. Jesse, Jr. testified that his view was blocked and he could not see exactly where the person went but a few minutes later he saw the man walk back to the car, get in and drive off. He testified that the person did not knock on Petitioner's door nor ring the doorbell because he would have heard that. He also told the jury that the man appeared to be alone and did not act like he was in a hurry and was not carrying anything. He described the person as a young man with a "real tight, clean haircut, wearing jeans, tennis shoes and a polo-type striped shirt. He testified that the person could have been Hispanic or

white. He was driving a gold Impala. Jesse, Jr. testified that a few minutes after the man left in the car, he saw Petitioner and his daughter walk across the street to Jose Cruz's house. Petitioner was wearing a T-shirt and shorts and was acting normal and L_____ D_____ was not crying. Jesse, Jr. testified that all this occurred between 10:00 a.m. and 11:00 a.m. He also testified that he heard no arguing or screaming coming from Petitioner's home that morning. Nor did he see a female at Petitioner's house that morning. He also testified that he did not hear Petitioner doing any digging in his backyard that morning. (R.R. III, pp. 121-131, 142-153) Later that weekend, Petitioner told Jesse, Jr. that his ex-wife was missing. When Jesse, Jr. told Petitioner about the man driving up to Petitioner's house in the gold Impala, Petitioner told Jesse, Jr. that he was not aware that had occurred. Petitioner told Jesse, Jr. that his ex-wife's car had been found at a Walgreen's store. (R.R. III, pp. 132-133) Jesse, Jr. described Petitioner as a friendly guy who got along well with everyone. (R.R. III, pp. 138-139)

Another neighbor, Karen Ozment, who lived across the street from Petitioner, testified that several days after Gonzalez went missing, Sandra Soto who was Julie Ann Gonzalez's mother, called her and said that Gonzalez was missing and asked if she would question the neighbors to see if they had seen anything. Ozment told the jury that she went across the

street and talked to Jesse Corpus Jr. During their conversation, Petitioner also walked up. Jesse told her that he had seen a young man driving what appeared to be Gonzalez's car park outside Petitioner's house around 10 a.m. on the day Gonzalez disappeared and then leave after five minutes. Jesse Jr. also told her that his father had told him that about 2:00 p.m. that same afternoon, he had witnessed two Mexican national males escorting Gonzalez back to the shed in appellant's backyard. Petitioner told Ozment and Jesse Jr. that on the morning she disappeared, Gonzalez had asked him to keep L_____ D_____ a little while longer. Ozment said that Petitioner also made the comment that Gonzalez had a lot of men on MySpace and she probably went off with one of the men. Ozment testified that Petitioner went on to say that Gonzalez was probably getting some stuff out of the shed because she was leaving. Jesse Jr. told Petitioner and Ozment that he had seen a picture of the man he saw drive up in Gonzalez's car on her MySpace page. (R.R. VI, pp. 63-73, 84-85)

Jason Jordan, a customer service technician for AT&T, testified that the phone company received a call on Friday, March 26, 2010 at approximately 9:47 a.m. advising that phone service in Petitioner's neighborhood had been interrupted that morning. Jordan testified that he responded to the area of Petitioner's home on Monday, March 29th to fix the

problem. He testified that he found that there was a problem with the underground cable that ran behind the playhouse in Petitioner's backyard.¹ Jordan testified that they dug up the area along the back fence line. Jordan said that to reach the damaged line, they had to move a woodpile and dig underneath the woodpile. About two or three feet down, Jordan found that the cable had been nicked in several places with a shovel or a pick. Jordan testified that he re-spliced the cable and put a waterproof closure on it. (R.R. VI, pp. 114-131, 135-139) Jordan testified on cross-examination that he did not know when the damage was done to the line. He could only testify as to when the phone company received the call. (R.R. VI, p. 133)

Gonzalez's Car

Robert Guerra who worked as an overnight cashier at the Walgreen's located at the corner of South 1st and Stassney testified that he was working on the evening of Friday, March 26, 2010. He testified that between 10:00 p.m. and 1:30 a.m. a woman walked into the front door of the store and stood just off to the side of the door. She waited until he was done waiting on customers and then she told Guerra she was having car problems and asked if she could leave her car there overnight. Guerra told her that would

¹ There were two outbuildings in Petitioner's backyard: the playhouse and the shed where the hole had been dug under the floor. Jordan testified that he did not go into the shed or do any digging around the shed. (R.R. VI, pp. 114-124) Interestingly, police never excavated the area behind the playhouse described by Jordan or did any kind of forensic examination of that area.

be okay as long as the car was moved the next day. The woman said that someone would come and look at the car the next day. The woman then left. Guerra testified that the woman acted normal and did not appear to be in any danger. Guerra said that on his next break he went out and looked at the car. It was parked in the side parking lot. Guerra told the jury that police came and asked him about the car a week later. Sometime after that Friday night, a woman came in and identified herself as Sandra something. She said she was the mother of the girl who owned the car. She showed Guerra a picture of her daughter and he recognized the person in the picture as the woman who had left the car at the store. (R.R. IV, pp. 88-101, 111-114)

Testimony About Police Involvement – the Missing Persons Unit

When Gonzalez disappeared, family members called police. Officer Jason Day testified that he responded to a call of a missing person on Saturday, March 27 at 10:57 p.m. He met with Gonzalez's aunt, Dora Soto, who told him that Gonzalez had last spoken to someone on Friday, March 26 at 11:00 a.m. Dora Soto told Day that she was afraid that Gonzalez had been harmed by Petitioner who was her ex-husband. (R.R. III, pp. 96-102) Day testified that he checked APD history and found a report dated January 10, 2010 that showed that Gonzalez had been a witness to a suicide attempt

by Petitioner. (R.R. III, p. 104) Soto told Officer Day that since Gonzalez had disappeared there had been several Facebook postings on Gonzalez's page saying that she was going to another state because she was in love with someone. It was Soto's opinion that this did not sound like something Gonzalez would write. Officer Day testified that Petitioner's home on Garden Oaks Drive was located in Travis County, Texas. (R.R. III, pp. 105-108)

Detective John Brooks testified that in March of 2010, he was a patrol officer with the Austin Police Department. On Sunday morning, March 28, 2010, he took a call about a missing vehicle and spoke to Sandra Soto, Gonzalez's mother. Soto informed him that her daughter had been missing for a couple of days and her car had been found in the Walgreen's parking lot. Brooks testified he examined the outside of the car and spoke to Soto, her sister Dora and to Aaron Breaux. After talking to them, he and two other officers proceeded to Petitioner's house at 5809 Garden Oaks Drive to speak with Petitioner since he was the last person that had seen Gonzalez. Petitioner spoke with the officers and told them that he had last seen Gonzalez around 10:30 or 11:00 a.m. on Friday. He said that she was acting weird. Petitioner told the officers that Gonzalez asked if he would keep L_____ D_____ for the weekend because she had something she had to

take care of but she would not tell him what she had to do. The officers checked Petitioner's house to make sure Gonzalez was not there and saw no sign of her. Detective Brooks told the jury on cross-examination that Petitioner gave them full access to the property and in no way tried to restrict their movement on the property. As part of their search, they checked the two sheds in the backyard. The officers noted that the larger shed on the right side of the back yard had plywood flooring and the officers could see that a large hole had been recently cut in the middle of the flooring. There was fresh sawdust on the floor. Underneath the flooring and the joists which supported the shed, they saw that a trench had been recently dug in the dirt. The trench measure approximately four feet long and two feet deep and was empty. The police saw no blood in the shed, nor was there any odor in the shed. Petitioner told the officers that someone had dug the trench for plumbing because they were going to turn the shed into an apartment. Detective Brooks told the jury on cross-examination that he found no evidence of a crime scene on Petitioner's property. (R.R. IV, pp. 118-132, 144-153) On cross-examination, Detective Brooks told the jury that although he noticed minor scratches on Petitioner's nose, they did not appear to be defensive wounds and he did not think they were significant to the investigation. (R.R. IV, pp. 142-144) Detective Brooks testified that

on Monday, March 29th, Sandra Soto called him and told him that someone from the car dealership had brought a key to the Walgreens parking lot and they were about to open the car. Police went to the Walgreens and found that the car had been unlocked by the time they arrived. They examined the car and found no blood on the car. They saw no damage to the car and they found nothing suspicious inside of the car. Detective Brooks testified on cross-examination that he did not consider the car a crime scene. (R.R. IV, pp. 137-138, 154-155, 157-160)

Detective David Gann testified the car was later taken to the Austin Auto Show Place, the car lot where Gonzalez had bought her car. There, he and Crime Scene Specialist Hernandez photographed and searched Gonzalez's car. They found nothing in the car that led them to believe that a crime had occurred in the car. (R.R. VI, pp. 144-149, 164-165)

Police were called to 5809 Garden Oaks Drive on March 28, 2010. There they met Petitioner's neighbor, Jesse Corpus, Jr. who testified that Petitioner was being harassed by Gonzalez's family members. (R.R. IV, pp. 164-167) Corpus also reported to the police that on the day that Gonzalez disappeared he saw a gold-colored Impala drive up to Petitioner's house and an Hispanic male or light-skinned black male got out of the car, hung around the front yard of Petitioner's house and then got back into the car and left.

Corpus told the police that he believed it was Gonzalez's car. (R.R. IV, pp. 168-169)

After patrol officers took the initial calls for this case the case was referred to the missing person's unit. Detective James Scott was one of the two detectives assigned to the missing person's unit. He told the jury that a lot of people just leave and never have contact with their friends or family again. He testified that he familiarized himself with the facts of the case, including the fact that Gonzalez's friends and family had been receiving text messages from her which said that she was running away to Colorado with "James" who was a website designer and had just built a house in Colorado. He also testified that Gonzalez's friends told police that the text messages sounded like something she would write because of the cadence and speech pattern in the messages. Detective Scott said that if Gonzalez was texting people there was no foul play involved. He felt that it was reasonable she would want to get away for a while and leave because he knew that she had a strained relationship with her mother. (R.R. V, pp. 7-18, 68-74)

Detective Scott said he also talked to Petitioner. In their first conversation over the phone, Petitioner told Scott that Gonzalez came to him and asked him to watch L_____ D_____ for a longer period of time because she had some things to do. Scott asked Petitioner to come in for an interview and

Petitioner did on two different days – April 6, 2010 and April 28, 2010.²
(R.R. V, pp. 29-34)

Sgt. William Summers also assisted the Missing Persons Unit on this investigation. He testified that he helped search Petitioner's house and found no murder weapon or any sign that any act of violence had occurred at that location. (R.R. V, p. 94, 109-119, 122)

Cassandra Cistone testified that back in 2010 she worked as an administrative specialist for the Austin Police Department's Missing Person's Unit. She testified that she ran searches to see if anyone had used Gonzalez's information back in 2010. She checked several databases maintained by the FBI, Accurant, LexisNexis and NCIC/TCIC. She testified that she got no hits. She testified that she now works for APD in the fusion center and she has continued to run searches on various databases and that up to the time of trial, had not received any hits. On cross-examination, she admitted that if Gonzalez was alive and was using a different name or a different date of birth or different identifying information she would have no way of knowing that. She also testified that she had no proof that Gonzalez was dead. (R.R. VII, pp. 217-230)

² The State introduced the videos from those interviews – State's Exhibit 58 from April 6th and State's Exhibit 59 from April 28th. The State also introduced transcripts from those interviews – State's Exhibit 63 from April 6th and State's Exhibit 64 from April 28th. (R.R.V, pp. 29, 33-34)

Testimony About Police Involvement – the Homicide Unit

The homicide unit was called into the case on May 4, 2010, about a month and a half after Gonzalez disappeared. Detective Rogelio Sanchez became the lead detective on the case. Sanchez detailed for the jury the people he interviewed and the things he learned. He testified that he believed something had happened to Gonzalez because she had had no contact with her daughter. In addition, none of her clothes were missing, her vehicle was found in Austin and no money had been withdrawn from Gonzalez's bank account other than three small transactions Petitioner had made at Walmart and McDonald's with Gonzalez's debit card on the day she disappeared. (R.R. VI, pp. 216-241) Sanchez issued a subpoena for the cell phone records for all the people who may have been in contact with Gonzalez's cell phone. He learned that the following people had contact with Gonzalez's cell phone on March 26 (the day she disappeared), March 27 and March 28: Alyssa Soto, Michael Soto, Amanda Hays, Natasha Navarro, Aaron Breaux, Sandra Soto, Dora Soto Cooper, Samantha Petri and Liliana Delacruz and Petitioner. Sanchez testified that the last activity for Gonzalez's phone number was on March 27 at 11:22 p.m. (R.R. VI, pp. 242-244) In addition, Sanchez learned that postings had been made to Gonzalez's MySpace account by Gonzalez saying that she was leaving town

and he subpoenaed those records. (R.R. VI, pp. 254-261). He also subpoenaed appellant's MySpace records. (R.R. VI, pp. 261- 265) Sanchez testified that he learned that on March 31, 2010, someone at the Timbers Apartments on Clayton Lane had accessed Petitioner's MySpace account eight times between 5:25 p.m. and 8:10 p.m. and also accessed Gonzalez's MySpace account at 5:42 p.m. using Mariana Reyes open IP address. He testified that Liliana DeLaCruz's boyfriend lived in the apartment building cattycorner to Reyes' apartment building. (R.R. VI, pp. 265-271) Sanchez also read to the jury several other postings that were made to Gonzalez' MySpace account after her disappearance. (R.R. VI, pp. 272-275) Sanchez ended his direct examination by saying that he had found no evidence of life for Gonzalez in the five years he had been working on the case. (R.R. VI, p. 281) On cross-examination, he also admitted that he had seen no evidence of Gonzalez's death in this case. (R.R. VI, p. 283) He also admitted that the IP address used by anyone who just went to a MySpace page and looked at it would be reflected on the MySpace records. He also admitted that he had no evidence linking Petitioner to viewing those MySpace pages at the Timber apartments. (R.R. VI, pp. 283-284) He also admitted on cross-examination that the police had received tips of sightings of Gonzalez in Austin and all over the United States and the Bahamas.

(R.R. VI, pp. 388-389) He also admitted that Gonzalez's body was never found, that police had no physical evidence showing that a violent act had occurred between Petitioner and Gonzalez, that police had found no physical evidence of a crime scene, and that there was no physical evidence showing that a crime had even occurred in Travis County. (R.R. VI, pp. 295-297)

Detective Richard Jennings, a homicide detective, also worked on the case. As part of his investigation, he was assigned to go to the Timber Apartments on Clayton Lane in North Austin to see who was leasing Apts. 608 (in Building 6) and 705 (in Building 7). Detective Jennings told the jury that the two apartments were in separate buildings but were diagonally across from each other with about 75 yards between them. Apt. 705 was rented by Ernestine and Javier Carrasco and Javier Carrasco was the boyfriend of Petitioner's sister, Liliana. Apt. 608 was rented by a person named Martina Reyes. (R.R. IV, pp 181, 199-202)

Detective Phillip Hogue was assigned to gather records and surveillance video for the investigation. (R.R. IV, pp. 213-222) He checked credit reports in Gonzalez's name and found that no accounts had been opened in her name after her disappearance. He also checked the use of Gonzalez's debit card and discovered that Petitioner had used Gonzalez's debit card on the afternoon of her disappearance – at a Walmart at Southpark

Meadows, at a McDonald's at Southpark Meadows and at a McDonalds on the corner of S.1st and William Cannon. Still photos taken from video footage from surveillance cameras inside the Walmart showed Petitioner pushing a shopping cart with L_____ D_____ inside through the store at around 2:21 p.m. Walmart records showed that Petitioner purchased a Princess DVD, a paint by number coloring book, baby shampoo, baby bubble path, baby wipes and a points card for an X-box. (R.R. IV, pp. 231-257) On cross-examination, Detective Hogue acknowledged that he had never interviewed Petitioner nor asked him if he had permission to use Gonzalez's debit card. Hogue did admit that he found nothing suspicious charged on Petitioner's bank account. (R.R. IV, pp. 279-287)

Petitioner's mother called police on May 4, 2010 and asked them to come look at the hole underneath the shed in the family's backyard. She told the officers that she had just noticed the hole and wanted police to check it out. She also wanted them to check out a mound of dirt that she had found behind the shed. (R.R. VI, pp. 89-91, 97-98) Detective Jeff Greenwalt and Detective Jason Staniszewski went to the house and looked at the shed and the backyard. Greenwalt testified that inside the shed they found some live rounds of .22 caliber ammunition. Some of the rounds were loose on the floor and some were inside of a water bottle. (R.R. VI, p. 94)

Outside of the shed, the detectives noted that there was a small area on the ground that had ashes and burned debris on it. It appeared there was some burned clothing in the debris and Detective Greenwalt testified that it looked like purple shoelaces and speculated that it could have been a drawstring. Greenwalt also noted that there was a picnic table in the backyard that had a black-handled silver knife under it and there were also a few blue latex gloves found in the backyard. (R.R. VI, pp. 95-96)

Detectives also obtained a search warrant and went back to Petitioner's house on May 14, 2010. During that search they found a receipt which showed that Petitioner had made several trips to Best Buy to buy several items and returned several items on March 26th, March 27th and March 28, 2010. (R.R. IV, pp. 270-275; R.R. V, p. 123-155)

APD Officer Jesse Midkiff, testified that he was assigned to the intelligence division of the Austin Regional Intelligence Center (a fusion center). He prepared a "no proof of life packet" on Gonzalez and found that Gonzalez had gotten no passport, no visa, and made no insurance claims using her real name. He testified that he ran several other searches and got no hits. (R.R. VII, pp. 231-237) On cross-examination, Midkiff admitted that if she was using another name, the database searches would not pick her up. He ended his testimony by saying that Gonzalez is missing but he

cannot say she is dead. (R.R. VII, p. 240)

Testimony from Petitioner's Family and Friends

Petitioner's sister Liliana testified she lived at the house on Garden Oaks with her mother and her siblings and at the time of Gonzalez's disappearance was in high school. She told the jury that on the morning of Gonzalez's disappearance their mother went to work at the airport and Petitioner had taken her and her sisters to school and then was supposed to be at home with L____ D____. She testified that her school started at 9:15 and it was a five to seven minute drive from their house to the school. That afternoon, Petitioner and L____ D____ picked up her sisters at Odom Elementary and then picked her up at Crockett High School at 4:15. Liliana testified that she was surprised that Petitioner still had L____ D____ but Petitioner told her that Gonzalez had asked if he could keep L____ D____ for the weekend. Liliana testified that she noticed that Petitioner had a scratch on his face but he acted normal. (R.R. III, pp. 182-193, 218-219)

Liliana testified that that evening a large number of family members came over and spent the evening. Saturday was a regular day with some cousins coming over in the afternoon and staying through the evening. On either Saturday or Sunday night, the entire group, including Petitioner and L____ D____ went to a carnival. (R.R. III, pp. 204-207, 209-212) Liliana did

remember that on Saturday afternoon, Gonzalez's mother Sandra Soto called Liliana's mother and asked if she knew where Gonzalez was. She remembered her mother telling Soto that L_____ D_____ was there but they did not know where Gonzalez was. (R.R. III, p. 209)

Petitioner's mother Victoria DeLaCruz, was called to the stand by the State. She told the jury that she had lived at 5809 Garden Oaks Drive in Austin for 25 years with her children – Petitioner, Lilianna who was twenty-one at the time of trial, K_____ who was fourteen and N_____ who was twelve. (R.R. V, pp. 162-165) She told the jury that Petitioner and Julie Ann Gonzalez began dating when they were in high school. The couple married after their child was born. They lived with different family members and were living with Victoria when they split up in late 2009. Victoria acknowledged that Petitioner played video games too much and this caused problems in the marriage. Victoria told the jury that she would see Gonzalez whenever she would come to the house to drop off or pick up L_____ D_____. In January of 2010, Petitioner overdosed on pills and was hospitalized. After that, Gonzalez went to court and got an order that all of Petitioner's visits with L_____ D_____ had to be supervised by Victoria or Liliana. Prior to his overdose, Petitioner was working at an alarm company. He did not work in January or February of 2010 but he began

working for a security company in March or April of 2010. (R.R. V, pp. 166-173) Victoria testified that on the day Gonzalez disappeared, L_____ D_____ had been staying at her house. Petitioner told Victoria that Gonzalez had come to the house in the morning and had asked if he could keep L_____ D_____ for a few more days because she had to leave town. Petitioner told her that Gonzalez had given him a credit card so that he could buy whatever L_____ D_____ needed. Victoria told the jury that this was not the first time Gonzalez had let Petitioner use her credit card because she knew he was not working and had no income. (R.R. V, pp. 175-177) She also told the jury that she was not surprised that Gonzalez asked Petitioner to keep L_____ D_____ for a few extra days because Gonzalez often liked to go out and she would leave L_____ D_____ with them when she did. Victoria told the jury that at the time she thought they would just have L_____ D_____ for the weekend but when Gonzalez did not come back for L_____ D_____, she knew something was wrong. (R.R. V, pp. 200-201) Victoria also told the jury that in May of 2010, she discovered the hole under the flooring in the shed in the backyard. She remembered that several weeks before she disappeared, Gonzalez called her and asked if she could come to the house because she had valuable jewelry at the house and she wanted it. Victoria told the jury that she remembered that conversation and wondered if

perhaps Gonzalez had buried jewelry, drugs or money under the shed and had come back to get it. Victoria told the jury that she did not know who had dug the hole. (R.R. V, pp. 192-199) Victoria also testified that on the day Gonzalez disappeared, Petitioner picked up his two youngest sisters from their school at 2:45 and then picked up Liliana from her school at 4:15. She testified that she arrived home from work at 3:30 p.m. and was at home when Petitioner brought her daughters home. She testified that everything seemed normal that night and that weekend. (R.R. V, pp. 204-208) Victoria testified that on Saturday afternoon, Sandra Soto, Gonzalez's mother called and said that Gonzalez was missing. On Sunday, they learned that Gonzalez's car had been found at the Walgreens store. (R.R. V, pp. 175, 211)

The evidence showed that Petitioner shared with other neighbors that his ex-wife was missing. Joe Cruz who lived across the street from Petitioner and his family told the jury that he had known Petitioner since he was a baby. (R.R. III, pp. 155-159) Cruz testified that one day when they were talking after Gonzalez had gone missing Petitioner showed him either a text message, a screen shot or a web page on a cell phone that was a message from Gonzalez's sister to Gonzalez that said something to the effect of "You need to come back. The family is all messed up." (R.R. III, pp. 165-167,

177-179)

Ariel Nunley, a distant cousin of Petitioner, testified that she was also a friend of Gonzalez. She remained friends with Gonzalez on MySpace and Facebook after Petitioner and Gonzalez split up and read posts on Gonzalez's pages that said she was going away and no one should worry about her. (R.R. IV, pp. 291-303) She testified that on the day of Gonzalez's disappearance a large group of family members gathered at Petitioner's home as was their custom on weekends. She stayed there until 11:00 p.m. or midnight and did not notice anything unusual about Petitioner. The next day, the family again gathered at Petitioner's home and again Nunley testified she stayed until about midnight. At some point during the weekend, a large group of family members went to a carnival that was being put on at Burger Center. Nunley testified that Petitioner and L_____ D_____ also went to the carnival with the group. Finally, Nunley testified that during that weekend she never saw Petitioner with a cell phone other than his own. (R.R. IV, pp. 304-307, 312-316)

Testimony From Gonzalez's Family and Friends

The evidence showed that Gonzalez was very close to her family. Her cousin, Michael Soto, testified that Gonzalez was like a sister to him. He testified that Gonzalez told him that Petitioner had been very

controlling of her when they were together and had been verbally abusive to her. Gonzalez also told him that Petitioner would play his Xbox for six or seven hours every night and did not pay attention to her or L_____ D_____. At one point, Gonzalez took L_____ D_____ and moved in with her grandparents in Dripping Springs. (R.R. III, pp. 8-18) Soto testified that he saw Gonzalez four or five times a week and knew that she was dating Aaron Breaux before she disappeared. Soto testified that he was with her the day before she disappeared and they had plans to see each other the next day. Soto testified that he tried to contact Gonzalez the next day but he could not reach her. On Saturday night, when he still had not heard from Gonzalez, he went to Petitioner's house and found him in the backyard with some other guys. Soto told the jury that Petitioner had scratches on both sides of the bridge of his nose. But on cross-examination, Soto admitted that when he gave the police a written statement, he did not say anything about Petitioner having scratches on his face. (R.R. III, pp. 25-33, 60-61)

Dora Soto, Gonzalez's aunt and the mother of Michael Soto told the jury about her close relationship with Gonzalez. She testified that Gonzalez lived with her while Gonzalez was attending Crockett High School. She told the jury that Gonzalez met Petitioner when they were juniors at Crockett. After the pair graduated from high school, they decided to move

in together. They got an apartment in South Austin and lived there for about a year. When Gonzalez got pregnant in 2009, the couple married. After L_____ D_____ was born, the couple moved into the house on Garden Oaks Drive with Petitioner's mother Victoria DeLaCruz. Soto testified that the couple had problems because Petitioner spent a lot of time playing video games and would not help with the baby. The couple split up and Gonzalez filed for divorce on December 16, 2009. Soto testified that Petitioner did not want a divorce and would not sign the paperwork. (R.R. III, pp. 214-227) Soto told the jury that she knew about Gonzalez rekindling her relationship with Aaron Breaux and also knew that she often spent the night at Breaux's apartment. (R.R. III, pp. 244-246) Soto testified that on the day of Gonzalez's disappearance she was waiting for Gonzalez to call her because they were supposed to eat lunch together. When she did not hear from Gonzalez she became very concerned. She checked with other family members and no one had heard from her. When she called Gonzalez's cell phone the call went straight to voice mail and when she texted she got no response. On Saturday around 7 p.m., Soto called police and filed a missing persons report. (R.R. III, pp. 248-252) Also on Saturday, Dora Soto began driving around looking for Gonzalez. As she was driving by the Walgreens located on Stassney, Soto spotted Gonzalez's car parked in the store parking

lot. She went into the store to look for Gonzalez but she was not there. Soto then called police to report her find but she was told that police could do nothing until Monday because there was no sign of foul play. In order to keep the car from being tampered with, Dora Soto and Sandra Soto stayed with the car. On Monday, they called the dealership who had sold the car to Gonzalez ten days earlier and got a set of keys and opened up the car. Gonzalez was not found in the car. (R.R. III, pp. 255-259) Soto concluded her direct testimony by telling the jury that Gonzalez never said anything to her about a person named James nor did she ever indicate that she was thinking of running away. (R.R. III, p. 259)

One of Gonzalez's best friends, Amanda Hays, told the jury that she knew that Gonzalez was not happy with Petitioner and wanted to get away from him because she felt he was controlling. She testified that she had dinner with Gonzalez and Breaux the night before Gonzalez disappeared and Gonzalez seemed excited about her future with Breaux. She testified that she texted with Gonzalez the next morning. Later that day she saw a Facebook posting by Gonzalez which said that she wanted to run away. When Hays tried to call and text Gonzalez to ask about the Facebook post, she got no response. Later she received a text from Gonzalez which said that Gonzalez said she was leaving Texas but she would be back. The text

said that she had met a man named James who was a web designer and was building a house in Colorado. (R.R. III, pp. 277-301)

Another of Gonzalez's close friends, Natasha Navarro, testified that Gonzalez was active on Facebook, MySpace and Live Journal. She told the jury that she knew that Gonzalez was dating Aaron Breaux and she testified that Gonzalez said nothing about dating anyone else. (R.R. III, pp. 305-316) Navarro testified that on the day Gonzalez disappeared she tried to call and text Gonzalez but got no answer. Then she got a call from Amanda Hays saying that there was some weird stuff on Gonzalez's Facebook and MySpace pages. Navarro went to Gonzalez's MySpace page and saw the entry which said something to the effect that she was going out on her own and she did not want anyone to look for her. Navarro told the jury that she immediately called Gonzalez who did not answer the phone. However, shortly thereafter she received a text from Gonzalez asking what was up. Navarro texted Gonzalez back and asked her to call her. Navarro received a text back saying that Gonzalez did not feel like talking. When Navarro called Gonzalez's phone again, she got no answer. Gonzalez then texted Navarro and said that she was going to Colorado with a guy named James who lived in Colorado for the weekend. She also texted that she thought she loved Aaron Breaux but realized that she did not. Navarro told the jury

that none of this sounded like anything Gonzalez would say. She felt that Gonzalez was not sending these texts. (R.R. III, pp. 318-326)

A____ S____, one of Gonzalez's cousins, testified that she was fifteen when Gonzalez disappeared. She also tried calling Gonzalez on the day of her disappearance and got no response. Later that day she got some text messages from Gonzalez saying that she wanted to go away and was very sad. She also felt like it was not Gonzalez sending the text messages. (R.R. III, pp. 330-338)

Gonzalez's sister, Samantha Petri, also testified. She testified that she stayed with Petitioner and Gonzalez one weekend when they were still together. She testified that the couple had an argument and went into their bedroom. Petri testified that while they were in the bedroom she heard banging against the wall. Gonzalez came out of the bedroom and told Petri that Petitioner had slapped her. About a week later Petri was visiting the couple again and saw Petitioner grab Gonzalez and yank her towards him. Petri told the jury that Gonzalez was devoted to L____ D____ and worried about leaving her with Petitioner because he did not care for her properly. Petri testified that she never heard Gonzalez talk about running away and she knew that Gonzalez loved Aaron Breaux. Petri said that she had no contact with Gonzalez on the day she disappeared and that was unusual.

Petri checked MySpace and saw that Gonzalez had written a post that said she wanted time for herself, she needed to get away and she did not want the family to worry about her. Petri told the jury that that did not sound like Gonzalez. Petri testified that she texted Gonzalez. She received a text back saying that the family should stop worrying about her and they should leave her alone. When Petri tried calling Gonzalez no one answered the call. Petri testified that she believed Gonzalez was writing the text messages because the text messages referred to her by her nickname – SP -- and not very many people knew her by that nickname. (R.R. IV, pp. 7-28, 62)

Gonzalez's mother, Sandra Soto, also testified and gave the jury information about Gonzalez. She testified that after Gonzalez split up with Petitioner that Petitioner was very hurt and so she talked to him a lot. She said that after Gonzalez filed for divorce Petitioner refused to sign the waiver. Petitioner told Soto that he felt his world had ended when Gonzalez left him. (R.R. VII, pp. 242-259)

Testimony About Gonzalez's Work Situation

The State introduced evidence showing that at the time of her disappearance, Gonzalez was working at the Walgreens on Riverside Drive in Austin as a pharmacy tech. Her store manager, MyLinda Burrow, testified that Gonzalez was a good employee and was a very loving mother

to L____ D____. (R.R. III, pp. 69-73) Burrow also said that Gonzalez was very responsible for her age. Gonzalez had told Burrow about her new boyfriend Aaron but she had never said anything to Burrow about anyone named James. Burrow said that she had checked records at the store and could not find any record of there being an employee of the store or a customer of the store named James. (R.R. III, pp. 80-82) The store pharmacist, Priscilla Verana, described Gonzalez as her most reliable pharmacy tech and said that she was well-liked by customers. She said that Gonzalez was very excited about the car she had just purchased and was devoted to L____ D____. She also told the jury that Gonzalez told her that Petitioner was very controlling and she wanted to divorce him. She testified that one day Gonzalez never showed up for work and that was very unusual. She told the jury that they never heard from her again. (R.R. III, pp. 88-94)

Testimony About Petitioner's Use of the Internet

During Petitioner's interviews with police he told police that after Gonzalez moved out from the house on Garden Oaks Drive he could not afford internet access and so it was turned off. He said that he accessed the internet at McDonalds or at work. (R.R. V, p. 57) The State devoted a lot of their case to showing that Petitioner accessed the internet at another

location – an apartment complex in North Austin where the boyfriend of Liliana DeLaCruz lived.

Police decided to check and see if Petitioner could access the internet from his house so on May 24, 2010, almost two months after Gonzalez disappeared, during the execution of the search warrant on Petitioner's house on Garden Oaks Drive, officers from the APD high tech unit ran tests and found an unsecured wireless connection coming from the house across the street from Petitioner's home. This house was owned by a woman by the name of Karen Ozment who testified at trial that she did not realize that her WIFI was unsecured. The IP address of that connection was IP-69.150.56.12. When Detective Joseph Lucas powered on Petitioner's Xbox, it automatically went to a Facebook account which the detective assumed was Petitioner's own Facebook account. Lucas testified that he saw no other online accounts, like MySpace. Lucas testified that Petitioner's sister Liliana had a wireless connection in her room but the signal from that connection was very weak in Petitioner's room. (R.R. VI, pp. 9-19, 32-40, 57, 77-78) Detectives also examined Petitioner's cell phone and determined it had not had cell phone service since February of 2010 but since that time had been used as a wireless device. The detectives did a system dump of the hard drive on the phone. The State introduced two

photos found on Petitioner's phone. State's Exhibit 98 was a photo of Petitioner and his daughter. State's Exhibit 99 was a photo of Gonzalez and Aaron Breaux. Detective Roby Godeaux admitted that he could not tell how the photo of Gonzalez and Aaron Breaux got on Petitioner's phone or when it was put on the phone. He agreed that it was very possible that someone could have forwarded the picture to Petitioner and he acknowledged that police seized the phone some six weeks after Gonzalez disappeared. (R.R. VI, pp. 41-50)

Martina Reyes testified that she lived in Apt. 608 of the Timber Apartments at 1034 Clayton Lane in Austin with her three children. She testified that she had internet service through Time Warner Cable. (R.R. V, pp. 156-160)

Pedro Carrasco testified that he was in a common-law marriage with Petitioner's sister, Liliana and he was friends with Petitioner. In March of 2010, Carrasco lived with his mother at the Timber Apartments on Clayton Lane, just north of Capital Plaza in north Austin. The Carrasco family lived in Apt. 708 in Building 7. Carrasco testified that Petitioner would come over to his apartment with Liliana and he would often bring his Xbox with him and they would play video games. Carrasco told the jury that his family did not have internet service in their apartment and he never saw

Petitioner access the internet when Petitioner was at his apartment. (R.R. V, pp. 215-222, 231-233, 238)

Testimony From Cellular Telephone Experts

Robert Lewis, a cellular engineer for AT&T testified that he could look at cell phone records and determine what cell phone tower was used when a cell phone made a telephone call. He examined the phone records for 512-940-6805 (the alleged victim's phone number). He testified that the phone was active and still making calls from March 25, 2010 through March 28, 2010. He testified that he saw no indication that the phone left the Austin area during that time period and he testified that it certainly did not travel to Colorado. He testified that he prepared State's Exhibit 43, a chart which showed the cell phone towers that were utilized by 512-940-6805. (R.R. VI, pp. 185 – 195)

Jim Cook, a wireless cell phone expert from California told the jury that he could look at cell phone records and make a graphic representation of the vicinity in which a cellular device was at a specific period of time. He told the jury that in this case, he reviewed call detail records for this case, reviewed the various locations of interest to police, mapped the activity for a certain period of time and determined the approximate location of several cell phones related to this case. The locations he focused on were

Petitioner's home at 5809 Garden Oaks Drive, the Best Buy in Sunset Valley, the Tony Burger Center at 3200 Jones Road, Crockett High School, the Walgreens at 5600 S. First St., Odom Elementary School, the McDonalds at 500 W. William Cannon, the Wal-Mart at South Park Meadows, Aaron Breaux's residence at 10601 Manchaca Rd, and Martina Reyes's residence at 1034 Clayton Lane near I-35 and Hwy. 290 in north Austin. (R.R. VII, pp. 52-71) Cook also reviewed Petitioner's X-box use. He testified that Petitioner was a heavy gamer and used his X-box everyday between March 2, 2010 and May 3, 2010. He testified that Petitioner had no gaming activity on his X-box from 11:45:21 p.m. on March 25, 2010 through 8:23:04 p.m. on March 26, 2010. Cook testified that this was very uncharacteristic of Petitioner's normal pattern. (R.R. VII, pp. 78-81) Cook testified that he examined the cell phone records for Julie Gonzalez's phone. Her records showed that she usually would arrive and depart from the vicinity of Petitioner's home within a few minutes of her arrival and this would be consistent with dropping off or picking up a child. However, Cook testified that after 11:32 a.m. on March 26, 2010, her cell phone was within the vicinity of Petitioner's house for extended periods of time through March 27th and the records showed that during this time there were multiple text messages and data connections. He also testified that on the afternoon

of March 26th at the same time Petitioner was shown on the video at the Walmart at Southpark Meadows, Gonzalez's cell phone was connecting to a cell phone tower which covered the vicinity of the Walmart. Then, from 8:37 p.m. to 8:59 p.m., at the same time Petitioner was at the Best Buy in Sunset Valley, Gonzalez's cell phone was connecting to a cell phone tower which covered the vicinity of the Best Buy. Cook testified that after 10:50 a.m. on March 26, 2010 through March 7, 2010, Gonzalez's cell phone had 27 data connections and 22 of them were when the phone was in the vicinity of Petitioner's residence. Cook also testified that on May 27, 2010 at 1:48 a.m., the cell phone went to the vicinity of the Reyes residence on Clayton Lane. (R.R. VII, pp. 81-89, 138-148) Cook testified that there was no chance Gonzalez's cell phone was in Colorado. (R.R. VII, pp. 129, 152) On cross-examination, Cook admitted that he had not seen any information that put Petitioner in physical possession of Gonzalez's cell phone. Cook also admitted that Dora Soto's (Gonzalez's aunt) house was in the vicinity of Petitioner's house and would use the same cell phone tower. (R.R. VII, pp. 187-190) Cook also admitted on cross-examination that he could only track the vicinity of the cell phone's location. He could not pinpoint the cell phone's location nor could he track a person. (R.R. VII, pp. 193-195)

Testimony From the Jailhouse Snitch

Justin Stewart testified that he was an inmate at the Travis County Correctional Center in Del Valle in 2013 when he met Petitioner who was in the same tank. Stewart told the jury that he was in jail on two counts of burglary of a habitation and a probation revocation on a theft charge. He said that Petitioner never said what he was in jail for. Stewart testified that one day he asked Petitioner how he was doing and Petitioner said he felt bad about something. Petitioner went on to tell Stewart that he had had an altercation with a girl with whom he had had a child. Petitioner told Stewart that he and the girl had an argument about a guy the girl had been talking to. Petitioner told Stewart that when the girl tried to leave, he tried to stop her and they had a physical fight. Petitioner said that they wrestled and at one point they both fell and the girl hit her head on a counter or something. Stewart said that the girl was apparently bleeding. The girl told Petitioner she was going to call someone and Petitioner said he stopped her. Petitioner told Stewart that the girl lost consciousness and Petitioner said that he did not know what to do. Stewart told the jury that that was all Petitioner told him and he told the jury that Petitioner was in tears as he told the story. (R.R. VII, p. 7-16, 32-34) Stewart told the jury on direct examination that he was receiving no benefit or promise of a benefit for his

testimony. (R.R. VII, pp. 20-22) However, on cross-examination Stewart admitted that when he was sentenced on his charges which were pending in 2013, his pending theft charge was reduced a from third degree felony to a state jail felony and he ended up getting thirteen months on the state jail theft offense and two three year TDC sentences on the burglary charges. He also testified that he had seven or eight prior theft convictions, a prior conviction for burglary of a building and a prior conviction for possession of cocaine and at the time of his testimony was in jail for a new offense. (R.R. VII, pp. 22-26)

After both sides rested and closed the jury heard argument from both sides, deliberated and then announced its verdict. The jury found Petitioner guilty of the offense of murder. (R.R. VIII, pp. 79-80; C.R. 139-145)

SUMMARY OF THE ARGUMENT

In his first four points of error, appellant argues that the Court of Appeals erred in finding the evidence sufficient. In its opinion the Court of Appeals relied on inferences to support its conclusion that the evidence was sufficient. However, Petitioner asserts that in a murder case where there is no body, no direct evidence that the victim is deceased, no direct evidence to prove the accused's culpable mental state, and absolutely no evidence of "a fatal act of violence" committed by the accused, the evidence is insufficient. The State must prove the elements of the offense beyond a reasonable doubt. Included in that is proof of the *actus reas* of the offense and the *mens rea* required for that specific offense. Here there was no proof of a fatal act of violence committed by Petitioner. Nor was there proof that if he committed a fatal act of violence that he acted with the requisite culpable mental state: either intentionally or knowingly (intending that the alleged victim's death result) or while intending to cause her serious bodily injury committed some act that resulted in her death. The Court of Appeals erred in finding the evidence sufficient.

In finding the evidence sufficient, the Court of Appeals relied on the testimony of a jailhouse snitch who testified that Petitioner told him he had had an altercation with a girl in which they were struggling and she

hit her head on a counter and was rendered unconscious. In its opinion the Court of Appeals erroneously wrote that the jailhouse snitch said Petitioner said the girl was the alleged victim and that the incident occurred at Petitioner's house. That is a misreading of the record and in his Fourth Ground for Review Petitioner urges the Court of Criminal Appeals to order the Court of Appeals to correct this misstatement of the facts in its opinion.

GROUND FOR REVIEW NUMBER ONE

IN A MURDER CASE, WHERE THERE IS NO BODY, NO DIRECT EVIDENCE OF A DEATH AND NO DIRECT EVIDENCE TO SHOW THAT PETITIONER ACTED EITHER INTENTIONALLY OR KNOWINGLY IN CAUSING THE ALLEGED VICTIM’S DEATH OR ACTED WITH INTENT TO CAUSE SERIOUS BODILY INJURY AND COMMITTED AN ACT CLEARLY DANGEROUS TO HUMAN LIFE THAT CAUSED THE ALLEGED VICTIM’S DEATH, MUST THE STATE PROVE A “FATAL ACT OF VIOLENCE” IN ORDER TO CONVICT A PERSON OF MURDER?

GROUND FOR REVIEW NUMBER TWO

THE COURT OF APPEALS ERRED IN FINDING THE EVIDENCE SUFFICIENT TO SUPPORT PETITIONER’S CONVICTION FOR MURDER WHEN THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE ALLEGED VICTIM WAS DECEASED AND THAT HER DEATH WAS CAUSED BY A CRIMINAL ACT OF PETITIONER.

GROUND FOR REVIEW NUMBER THREE

DID THE COURT OF APPEALS ERR IN FINDING THE EVIDENCE SUFFICIENT TO SUPPORT PETITIONER’S CONVICTION?

In its opinion, the panel of the Third Court of Appeals found the circumstantial evidence sufficient to support Petitioner’s conviction for murder and specifically found that the evidence was sufficient to support a finding that:

“Petitioner (1) intentionally or knowingly caused Julie’s death or (2) intended to cause her serious bodily injury and committed an act clearly dangerous to human life that caused her death. *See* Tex. Penal Code Sec. 19.02(b)(1), (2).”
Delacruz v. State, 2017 Tex.App.LEXIS 3563 at *71-72.

The Court then went on to list factors that supported its conclusion:

- (1) Petitioner had a motive and opportunity to kill Julie;
- (2) Petitioner was physically and verbally abusive and controlling towards Julie during their marriage;
- (3) Petitioner became emotionally unstable when she left him and adamantly opposed their divorce;
- (4) Petitioner threatened her, stalked her, and engaged in irrational behavior such as threatening suicide and feigning amnesia for several weeks;
- (5) Shortly before Julie disappeared, Petitioner's unstable behavior escalated to rage as reflected in his social-media postings and emails to Julie;
- (6) Petitioner did not engage in his usual gaming activity around the time Julie disappeared;
- (7) Petitioner arranged for Julie to come pick up their daughter at his house when no one else would be around;
- (8) Petitioner was the last person to see her alive;
- (9) Petitioner had scratches on his face the afternoon that Julie disappeared;
- (10) There was evidence that Petitioner dug "grave-like" holes in his back yard around the time of Julie's disappearance.

The Court went on to list factors that showed that Petitioner engaged in behavior that indicated a consciousness of guilt:

- (1) Petitioner possessed Julie's phone after her disappearance and was responsible for numerous messages sent from her phone indicating that she had voluntarily left the state with another man;
- (2) Petitioner possessed and used Julie's credit card to buy items for himself and their child after her disappearance;
- (3) Petitioner made numerous misleading and inconsistent statements to law enforcement, his family, neighbors and Julie's family and failed to disclose crucial information to those individuals;

Finally, the Court listed other evidence that it labeled "incriminating":

- (1) Petitioner signed the waiver of service for Julie's divorce petition three days after she disappeared after refusing to sign it for months;
- (2) Items belonging to Julie were found at Petitioner's house including her insurance card;

- (3) Petitioner's "highly uncharacteristic period of gaming inactivity coincided with the hours in which Julie went missing";
- (4) A county jail inmate testified that Petitioner had "admitted to an act of physical violence against Julie 'over some other guy that she was talking to' at his home that had left her bloodied and unconscious."

The Court of Criminal Appeals has held that the legal sufficiency standard set out in Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979) is the only standard that a reviewing court should apply when determining the sufficiency of the evidence. Brooks v. State, 323 S.W.3d 893, 896 (Tex.Cr.App. 2010). In conducting a legal sufficiency review, an appellate court is to review the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.

Petitioner would assert that the Court of Appeals failed to properly apply the standard set out in Jackson v. Virginia, in that the Court failed to evaluate the case in light of the requirement that there be proof of the essential elements of the offense. Petitioner would assert that the suspicious behaviors relied on by the Court of Appeals and set out above and in the Court of Appeals' opinion are indicative of guilt and sufficient to support a conviction for murder only when they are linked to wrongful conduct – "a fatal act" perpetrated by Petitioner against the alleged victim. The corpus

delicti of the offense of murder is established if the evidence shows the death of a human being caused by the criminal act of another. Fisher v. State, 851 S.W.2d 298, 303 (Tex.Cr.App. 1993).

To show that an offense has been committed, the State must prove the statutorily required *actus reus* and the *mens rea* of the crime. See Ramirez-Memije v. State, 444 SW.3d 624, 627 (Tex.Cr.App. 2014); Cook v. State, 884 S.W.2d 485, 487 (Tex.Cr.App. 1994). The *actus reus*, or the prohibited conduct, of murder is the causing of the death of an individual. The State must also prove beyond a reasonable doubt that the accused acted with the requisite culpable mental state or *mens rea*, when he committed the *actus reus*. Murder is a “result of conduct” offense and thus the culpable mental state or *mens rea* must relate to the result of the conduct (causing the death). Schroeder v. State, 123 S.W.3d 398, 400 (Tex.Cr. App. 2003).

In Petitioner’s case, the State was charged with proving beyond a reasonable doubt that Petitioner committed an intentional or knowing act (intending that the alleged victim die) or while intending to cause serious bodily injury, committed an act clearly dangerous to human life that resulted in the alleged victim’s death. Texas Penal Code, Sec. 19.02(b)(1) and (b)(2). But a review of the evidence adduced by the State and relied on by the Court of Appeals to affirm Petitioner’s conviction, shows that there was no

evidence proving that Petitioner committed a fatal act towards the alleged victim (the *actus reus*). Nor was there any evidence adduced to show that Petitioner had the requisite culpable mental state (the *mens rea*) – that he committed an intentional or knowing act intending that she die as a result of that act, or that while intending to cause her serious bodily injury, he committed an act clearly dangerous to human life that resulted in her death.

A review of case law shows that Texas courts have required proof of a “fatal act of violence” committed by the defendant before a murder conviction will be upheld. In Stobaugh v. State, 421 S.W.3d 787 (Tex.App.-Ft. Worth 2014, pet. ref.), the Ft. Worth Court of Appeals was faced with a case very similar to Petitioner’s case. The alleged victim’s body was never found and no determination was made as of a cause of death. In reviewing the sufficiency of the evidence and finding it insufficient, the Ft. Worth Court of Appeals wrote:

“This evidence, along with the other evidence viewed in the light most favorable to the State supports a reasonable inference that Kathy is dead and certainly establishes that Charles possessed a possible motive and a definite opportunity to kill Kathy. This evidence viewed in the light most favorable to the State likewise establishes that Charles lied about certain events surrounding Kathy’s disappearance – calling Kathy’s cell phone and leaving a message and hiring a private investigator with Kathy’s money – and that Charles’s conduct after December 29 was suspicious. But the question is whether the cumulative force of the facts in the record before us support a deduction by any rational finder of fact of the logical

consequence or conclusion that ‘with intent to cause serious bodily injury to an individual, namely Kathy Stobaugh, [Charles] commit[ted] an act clearly dangerous to human life that caused the death of said Kathy Stobaugh, by manner and means unknown’ or that Charles intentionally or knowingly caused Kathy’s death by a manner and means unknown.” 421 S.W.3d at 863 (emphasis added)

The Ft. Worth Court of Appeals then went on to find that even after viewing the evidence in the light most favorable to the verdict, there were no facts in the record to prove that Stobaugh committed any specific act directed at the alleged victim. The Court found there was no evidence to show that a deadly weapon was used and thus no inference could be made as to Stobaugh’s intent through the use of a weapon. Likewise, the alleged victim’s body was never found so no autopsy was conducted and no evidence existed to show what injuries, if any, the alleged victim suffered. Thus, no inference could be made as to Stobaugh’s intent from the alleged victim’s injuries, if any. Because there were no facts in the record that established Stobaugh’s conduct --- an act by him towards the alleged victim – there was no evidence from which the jury could have “logically inferred that Charles possessed the requisite *mens rea* to support a conviction for murder.” Stobaugh v. State, 421 S.W.3d at 864. The Ft. Worth Court of Appeals reversed Stobaugh’s conviction because there was no evidence that wrongful conduct – a violent act – occurred and as a result no evidence to

prove up the *mens rea* alleged in the indictment:

“In other words, the circumstantial evidence, even if it supports an inference that Charles did something to Kathy and that Kathy died as a result of that something nonetheless wholly fails to provide the jury with any facts from which the jury could also reasonably infer that the *mens rea* Charles possessed when he did that something to Kathy was the *mens rea* for murder, as opposed to some other *mens rea*, such as the *mens rea* for manslaughter. See *Cavazos*, 382 S.W.3d at 384 (explaining that causing death while consciously disregarding a risk that death will occur is the *mens rea* for manslaughter and that this is a less culpable *mens rea* than the *mens rea* for murder – either by intending to cause serious bodily injury resulting in a death or by intentionally or knowingly causing a death). The jury’s finding in this case that Charles, with the requisite *mens rea*, committed an act clearly dangerous to human life that resulted in Kathy’s death or intentionally or knowingly caused Kathy’s death is based on speculation and cannot support a finding of guilt beyond a reasonable doubt. See *Megan Winfrey*, 393 S.W.3d at 771.” Stobaugh v. State, 421 S.W.3d at 868.

A similar analysis was conducted in the case of Hacker v. State, 389 S.W.3d 860, 870-871 (Tex.Cr.App. 2013). Hacker’s deferred adjudication probation was revoked and he appealed arguing that the evidence was insufficient to show that he violated the “no contact” conditions of his probation. On appeal, the Court of Criminal Appeals looked at the question of whether motive and opportunity and the inferences made from that evidence can be sufficient to support a conclusion that the defendant engaged in wrongful conduct:

“Evidence of motive helps link a defendant to wrongful

conduct or is supportive of other evidence of such conduct. The same is true of evidence of opportunity. But without evidence that wrongful conduct has occurred, there is nothing for motive and opportunity evidence to link the defendant to. If, for example, John has a motive for murdering Mary, but there is no evidence that Mary is dead (much less evidence that her death was a homicide), then John's motive is meaningless. His motive alone does not establish that a murder occurred and the motive cannot link John to a murder without evidence that there was a murder." Hacker v. State, 389 S.W.3d at 871.

Petitioner would ask the Court of Criminal Appeals to reconcile the Third Court of Appeals opinion in his case with the Court of Criminal Appeals opinion in Walker v. State, 2016 Tex.Crim.App.Unpub.LEXIS 973 (Tex.Cr.App. October 19, 2016). In Walker, the Walkers were convicted of injury to a child where it was alleged that they caused second-degree burns to their grandchild by immersing her legs and feet in hot liquid. In Walker, the Court stressed that juries are permitted to make reasonable inferences from facts supported by the evidence but are not permitted to come to conclusions based on mere speculation or unsupported inferences or presumptions. The Court then reviewed the evidence and wrote that none of the nineteen witnesses who were called to testify could testify as to what actually happened, who was present when the injuries occurred, and who was at fault. Although several experts from both sides gave competing opinions as to how the child was injured and whether the injuries were intentionally inflicted, the Court ended up writing:

“Given the number of outstanding questions about whether the injury was accidental or intentionally inflicted, how this alleged offense might have been committed, and who might have committed it, we conclude that a rational jury would have had at most only a strong suspicion of guilt under these circumstances.” 2016 Tex.Crim.App.Unpub.LEXIS 973 at *16.

Texas appellate courts have repeatedly held that in cases such as Petitioner’s where the alleged victim’s body is never found, evidence of motive and opportunity, evidence of inconsistent statements or false statements by the accused, and evidence of the accused’s actions after the disappearance of the alleged victim are not sufficient to establish that the accused has committed a murder: that he committed the *actus reas* of murder or that he possessed the requisite *mens rea* to support a murder conviction. Nisbett v. State, 2016 Tex.App.LEXIS 13252 (Tex.App.-Austin 2016, pet. granted); Stobaugh v. State, *supra*.

Petitioner would assert that the circumstantial evidence relied on by the State and summarized in the Statement of Facts does not establish the perpetration of any fatal act by him towards the alleged victim. As noted in the Statement of Facts, the State’s primary source of evidence that the alleged victim was dead was the absence of evidence showing that she was alive. Petitioner asserts that this was not sufficient evidence to prove beyond a reasonable doubt that she was dead. Over and over again, the

State's witnesses testified that they did not know for certain that the alleged victim was deceased. This included (1) Dora Soto – the alleged victim's aunt (R.R. III, p. 269-270); (2) Detective James Scott – one of the first detectives on the case (R. R. V, pp. 83, 92); (3) Sgt. William Summers - who assisted the Missing Persons Unit (R.R. V. p. 122); and Detective Rogelio Sanchez – the lead homicide detective. (R.R. VI, pp. 282-283, 295-297)

The first five factors relied on by the Court of Appeals to establish Petitioner's guilt set out above on page fifty of this brief certainly show that Petitioner had a troubled relationship with the alleged victim. It is a stretch however, that this gave Petitioner a motive to kill or hurt the alleged victim. This type of evidence may help link a defendant to wrongful conduct but “without evidence that wrongful conduct has occurred, there is nothing for motive . . . evidence to link the defendant to.” See Stobaugh v. State, 421 S.W.3d at 865 (citing Hacker v. State, 389 S.W.3d at 870-871). And clearly, the State introduced no evidence that any wrongful conduct or a fatal act of violence occurred.

Likewise, factors six through ten which the Court of Appeals relied on in finding the evidence sufficient and which are set out on page fifty of this brief, do not establish a fatal act of violence perpetrated against the alleged victim on the day she disappeared. In addition, Detective Rogelio Sanchez

testified that the alleged victim's body was never found, police found no physical evidence indicating a violent act occurred, and no weapon was ever linked to any violent act committed by Petitioner against the alleged victim. (R.R. VI, pp. 295-297) During his questioning of Detective Sanchez, Prosecutor Gary Cobb tried to suggest different possible ways that someone could kill someone and not leave blood evidence behind – like strangling them, asphyxiating them, inflicting blunt force trauma on them. (R.R. VI, pp. 301-302) But on cross-examination, Detective Sanchez admitted that he had found no evidence to support any of the hypotheticals suggested by Mr. Cobb. (R.R. VI, p. 306)

In its opinion, the Court of Appeals listed three factors which it said indicated a consciousness of guilt by Petitioner (These are set out on page fifty of this brief). The fact that Petitioner possessed the alleged victim's phone after her disappearance and may have been responsible for numerous messages sent from her phone indicating that she had voluntarily left the state with another man, the fact that he possessed and used her credit card to buy items for him and their child after her disappearance and the fact that Petitioner made misleading and or inconsistent statements to people is certainly suspicious. But these things do not establish the wrongful conduct alleged (the fatal act of violence accompanied by the requisite *mens rea*).

Likewise, the first three factors which the Court of Appeals labeled as “incriminating” and which are set out on pages fifty and fifty-one of this brief, while raising suspicions about Petitioner, still do not prove that he engaged in wrongful conduct. These factors would be indicative of guilt only when linked to wrongful conduct. Without evidence of that wrongful conduct – a fatal act perpetrated by Petitioner against the alleged victim – these suspicious behaviors have nothing to corroborate. By themselves, they certainly do not support an inference that Petitioner engaged in the wrongful conduct alleged against him.

Finally, the Court of Appeals listed as an incriminating factor that a county jail inmate testified that Petitioner had “admitted to an act of physical violence against Julie ‘over some other guy that she was talking to’ at his home that had left her bloodied and unconscious.”³ The State did put on a jailhouse snitch who testified that Petitioner told him about an incident where he struggled with a woman and she fell and hit her head on a counter and was rendered unconscious. (R.R. VII, pp. 7-16, 32-34) The jailhouse snitch never testified that Petitioner told him the woman was the alleged victim. The prosecutor inserted the alleged victim’s name in one of his

³ See Ground For Review Number Four which sets out the inaccuracies of the Court of Appeals opinion recounting of that testimony.

questions, but the witness never testified that Petitioner identified the woman as the alleged victim. The jailhouse snitch's testimony does not prove a "fatal act" perpetrated by Petitioner against the alleged victim. First, there was no evidence adduced that the woman he struggled with was the alleged victim. Second, that evidence in no way proved an intentional or knowing act by Petitioner that showed he intended to cause her death nor did it show that Petitioner intended to cause serious bodily injury to the alleged victim and committed an act that was clearly dangerous to her life.

Petitioner would assert that the state of the evidence in his case left a number of outstanding questions that a jury could not have determined beyond a reasonable doubt – whether the alleged victim is in fact deceased; if she is deceased, how she died; what wrongful act (*actus reas*) caused her death; who caused her death; and what the *mens rea* of the actor was at the time of the wrongful act.

Petitioner urges the Court of Criminal Appeals to adopt the reasoning of the Third Court of Appeals in Nisbett v. State, 2016 Tex.App.LEXIS 13252 (Tex.App.-Austin, pet. granted). Nisbett's wife went missing under suspicious circumstances and was missing for twenty years before Nisbett was charged with her murder. Her body was never found, the evidence strongly suggested that something bad had happened to her, and the

evidence also showed that Nisbett had engaged in suspicious behavior around the time of her disappearance. Nisbett was tried and convicted of the murder of his wife. Much of the same type of evidence that was used as circumstantial evidence against Petitioner was used against Nisbett. On appeal, the panel of Third Court of Appeals reversed Nisbett's conviction on the basis of insufficient evidence. The Nisbett opinion contains the following language:

“‘The corpus delicti of murder is established if the evidence shows the death of a human being caused by the criminal act of another.’ *McDuff*, 939 S.W.2d at 615. Here, the State's evidence failed to show that Vicki's alleged death resulted from a criminal act of appellant. Even if it can be inferred that Vicki is dead, there is no evidence of the criminal act that caused Vicki's death or that appellant perpetrated that criminal act. The circumstantial evidence presented by the State raised only suspicions about appellant; it did not demonstrate a criminal act nor support an inference of such. There is no evidence, direct or circumstantial, to prove beyond a reasonable doubt that appellant caused Vicki's death – an essential element of the offense. Thus, the evidence failed to establish the *actus reus* of the charged murder offense.

“Furthermore, even if we accept the inference that Vicki is dead, and the further speculative inference that appellant somehow caused her death by some unknown and unidentified act, the evidence remains insufficient to support appellant's conviction for murder. The evidence failed to demonstrate that appellant committed such fatal act with the requisite *mens rea*. The *mens rea* element of the offense of murder – as charged in the indictment here – required proof that appellant *intentionally or knowingly* caused Vicki's death by a manner and means unknown or that *with intent to cause serious bodily injury to Vicki* appellant committed an act clearly dangerous to human

life, by an unknown manner and means, that caused Vicki's death. See Texas Penal Code Sec. 19.02(b)(1), (2). The State was required to prove that appellant possessed one of the alternate mental states to satisfy the element of intent under the murder statute. See *Stobaugh*, 421 S.W.3d at 861; see, e.g., *Jefferson*, 189 S.W.3d at 313.

. . .

“Evidence and facts from which to infer appellant's mental state do not exist in the record before us. As discussed previously, the State failed to present evidence of precisely what fatal act appellant committed. Without evidence of how appellant caused Vicki's death, his mental state cannot be gleaned from the act or conduct itself or any associated words. Vicki's body has never been found and no autopsy has been performed, so no evidence exists concerning the types of injuries purportedly inflicted upon Vicki. Without evidence of the injuries, there is no way to discern the method of producing fatal injuries, how such injuries were inflicted, or the extent of the injuries. Thus, the jury could not infer appellant's mental state from facts relating to the injuries as none were shown. Further, the record contains no evidence that a deadly weapon was used; thus, no deadly-weapon facts exist from which the jury could infer appellant's intent. There are simply no facts from which the jury could infer appellant's intent. No evidence in the record supports the inference that appellant intentionally or knowingly caused Vicki's death or with intent to cause serious bodily injury to Vicki committed a clearly dangerous act that caused her death.” Nisbett, 2016 Tex.App.LEXIS 13252 at *45-48.

Petitioner would assert that just as in Nisbett, there was no evidence to prove that he engaged in wrongful conduct (*actus reas*) which resulted in the alleged victim's death. Petitioner further asserts that even if the jury could have inferred that “something” happened to the alleged victim in Petitioner's case and could have further inferred that Petitioner was responsible for that

“something” and even that the “something” caused the alleged victim’s death, there were no facts or circumstances from which the jury could have reasonably inferred that while that “something” was occurring, Petitioner possessed the requisite *mens rea* to support a conviction for murder. These grounds for review should be sustained and this case should either be remanded back to the Court of Appeals for reconsideration of the sufficiency of the evidence or in the alternative, this Court should enter an order of acquittal for the offense of murder.

GROUND FOR REVIEW NUMBER FOUR
**THE COURT OF APPEALS RENDITION OF CRUCIAL EVIDENCE
IN ITS OPINION WAS ERRONEOUS AND THE COURT OF
APPEALS RELIED ON THIS ERRONEOUS RENDITION OF THE
EVIDENCE IN FINDING THE EVIDENCE SUFFICIENT TO
SUPPORT PETITIONER'S CONVICTION.**

As noted above, this was a murder case based solely on circumstantial evidence. The alleged victim's body was never found. There was no evidence establishing a cause of death. The investigation never revealed a crime scene. All of the law enforcement officers who testified admitted during their testimony that there was no proof that the alleged victim was deceased. They also all admitted that if in fact the alleged victim was dead, they had no proof that Petitioner either intentionally or knowingly did anything to cause her death or that if he did cause some harm to the alleged victim that he committed an act clearly dangerous to human life and that at the time he had the intent to cause her serious bodily injury. For this reason, a crucial part of the State's case was the testimony of a jailhouse snitch named Justin Stewart. Stewart testified that he was an inmate at the Travis County Correctional Center in 2013 when he met Petitioner who was housed in his tank. Stewart testified that one day he asked Petitioner how he was doing and Petitioner said he felt bad about something. Petitioner went on to tell Stewart that he had had an altercation with a girl with whom he had a child. Petitioner told Stewart that he and the girl had an argument about a

guy the girl had been talking to. Petitioner told Stewart that when the girl tried to leave, he tried to stop her and they had a physical fight. Petitioner told Stewart that they wrestled and at one point they both fell and the girl hit her head on a counter or something. Stewart testified that the girl was apparently bleeding. Petitioner said that the girl told Petitioner she was going to call someone and Petitioner said he stopped her. Petitioner told Stewart that the girl lost consciousness and Petitioner said that he did not know what to do. Stewart told the jury that was all that Petitioner told him and he told the jury that Petitioner was in tears as he told the story. (R.R. VII, pp. 7-16, 32-34)

In its opinion, the Court of Appeals used Stewart's testimony as a key piece of the evidence that incriminated Petitioner but it repeatedly erroneously described the evidence in ways that make it sound far more definite and incriminating than it actually was. For example, the Court of Appeals wrote in its opinion a heading that reads: **"32. Delacruz described a violent altercation with Julie to a fellow inmate"**. The opinion goes on to say that Petitioner "described an altercation that occurred between Julie and himself in which she hit her head, was bleeding and became unconscious." Delacruz v. State, supra at *68. A review of Stewart's testimony shows that Stewart never testified that Petitioner told him the girl

in the story was Julie. Again, under the heading **“4. Other incriminating evidence”**, the Court of Appeals wrote:

“Finally, Stewart testified that Delacruz had admitted to an act of physical violence against Julie ‘over some other guy that she was talking to’ at his home that had left her bloodied and unconscious.” Delacruz v. State, supra at *77.

This statement is erroneous on two important points. First, Stewart never testified that Petitioner named the girl in the altercation as Julie. Second, Stewart never testified that Petitioner told him the incident occurred at his home. These are two crucial misstatements that the opinion uses as inferences to support Petitioner’s conviction. But they are erroneous because Stewart, the jailhouse snitch, never testified to those two key items.

While it is true that in some cases, a verdict of guilty may be supported by reasonable inferences from the evidence, Petitioner would assert that where the appellate court misconstrues the evidence and erroneously sets out the evidence, the inferences from the use of that erroneously construed evidence are not reasonable and cannot be used to support a finding that the evidence is sufficient to support a conviction based solely upon circumstantial evidence. Appellant asserts that before an appellate court can properly apply the law to the facts of a case, it must have an accurate understanding of the facts. Here the opinion from the panel of the Third Court of Appeals contains a serious factual error and it should be corrected.

This ground for review should be sustained.

PRAYER

Appellant respectfully requests that this Honorable Court sustain his grounds for review and reverse the Third Court of Appeals and remand the case or in the alternative, enter an order of acquittal.

Respectfully submitted,

/s/ Linda Icenhauer-Ramirez

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 14,186 words, excluding the items listed in Tex.R.App.Proc. 9.4(i)(1) as calculated by the word count function on my computer.

/s/ Linda Icenhauer-Ramirez

LINDA ICENHAUER-RAMIREZ

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Petitioner's Brief on Petition for Discretionary Review was e-served to the Travis County District Attorney's Office and e-served to the Office of the State Prosecuting Attorney on this the 25th day of August, 2017.

/s/ Linda Icenhauer-Ramirez
LINDA ICENHAUER-RAMIREZ